IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SUSAN K. WILSON, an individual,

Plaintiff,

v.

STATE OF OREGON; THEODORE KULONGOSKI, Governor of Oregon; JOHN KROGER, Attorney General of the State of Oregon; SCOTT HARRA, Director, Oregon Department of Administrative Services; CLAUDIA BLACK, Health Policy Advisor to the Governor; TONY GREEN, Director of Communications and Policy for Oregon Dept. of Justice; DONNA SANDOVAL BENNETT, Assistant Attorney General; and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503; CHRISTINA McCALLISTER; TIMOTHY MOLLOY; CERYNTHIA MURPHY; SAMANTHA PATNODE; LAWRENCE PECK; and CALLIE ZINK, individuals,

Defendants.

Civ. No. 10-6393-AA
OPINION AND ORDER

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AIKEN, Chief Judge:

Plaintiff Susan Wilson filed suit against the State of Oregon, the former Governor and other state officials and employees (State defendants), the Service Employees International Union, Local 503 (Local 503), an Oregon public employees union, and individual union members. Plaintiff alleges violations of her constitutional due process rights pursuant to 42 U.S.C. § 1983, breach of contract, wrongful discharge, and intentional interference with her employment. Certain State defendants move for partial summary judgment with respect to plaintiff's first three claims for relief, and plaintiff moves for leave to amend her complaint. For the reasons set forth below, State defendants' Motion for Partial Summary Judgment (doc. 44) is granted in part and denied in part, and plaintiff's Motion to Amend Complaint (doc. 55) is denied.

BACKGROUND

Plaintiff was employed with the state of Oregon as Director of the Oregon Health Licensing Agency (OHLA) from July 1, 1999 to March 5, 2009. Plaintiff was appointed by then-Governor Kitzhaber, but the Director of the Oregon Department of Administrative Services (DAS) later became her appointing authority. Pl.'s Decl. at 3. Scott Harra was the Director of DAS at the time of

plaintiff's discharge. Id.

In February 2003, then-Governor Kulongoski instituted a new directive requiring agencies to streamline their operations and reduce impacts of governmental regulation on Oregon businesses. In 2005, Kulongoski issued a second regulatory streamlining directive. In 2007, Kulongoski instructed health-related agency directors to ensure the enforcement of Oregon's consumer protections laws.

With the assistance of her administrative services director, Richard McNew, plaintiff initiated a planning process to achieve compliance with the Governor's regulatory streamlining objectives. The plan involved reorganization of the agency and reassignment of OHLA staff. The hiring of additional temporary staff was required to accomplish these tasks.

Defendants McCallister, Molloy, Murphy, Patnode, Peck, and Zink complained to Local 503 representatives that plaintiff engaged in nepotism and misconduct. Plaintiff alleges that these complaints were motivated by defendants' displeasure regarding the proposed reorganization of OHLA and potential reassignments.

Local 503 representatives relayed these complaints to the Governor's office and the Attorney General's office. In doing so, plaintiff maintains that Local 503 unlawfully bypassed the grievance process pursuant to the collective bargaining agreement between Local 503 and the State. Further, plaintiff alleges that State officials did not notify plaintiff of the complaints.

In late January 2009, Local 503 officials, representatives from the Governor's office and DAS, and several OHLA employees met to discuss the complaints against plaintiff and McNew. Plaintiff alleges that she was not afforded the opportunity to address the staff grievances.

On February 2, 2009, plaintiff was placed on administrative leave pending an investigation of the allegations concerning her performance. Dfs.' Memo. in Support of Motion for Partial Summ. Judg. at 3. Later that day, the Governor's office issued a press release stating that plaintiff had been placed on administrative leave while charges of misconduct and nepotism were being investigated. Pl.'s Decl. at 6.

On February 3, 2009, published reports stated that the Governor's office "take[s] these allegations very seriously." Id.

On February 4, 2009, the Attorney General's spokesperson, Tony Green, publicly stated that plaintiff was being investigated for "wrongdoing." Id.

On March 5, 2009, Harra notified plaintiff that she was being permanently discharged. Id. at 7. Plaintiff was never offered a name-clearing hearing. Dfs.' Memo. in Support of Motion for Partial Summ. Judg. at 3.

STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Motions for partial summary judgment are evaluated using the same standard. Id. The Court's role is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A dispute involving a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson 477 U.S. at 248. A "material fact" is one that has "the potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). The materiality of a fact is determined by the substantive law governing the claim. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

The moving party has the burden of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon the moving party's meeting that burden, the non-moving party must then go beyond the pleadings and identify facts which show a genuine issue of fact for trial. Celotex, 477 U.S. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the

moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W., 809 F.2d at 630.

DISCUSSION

I. State Defendants' Motion for Partial Summary Judgment

Certain State defendants, including the State of Oregon, Kulongoski, Kroger, Bennett, Black, Green, and Harra, move for partial summary judgment as to plaintiff's first three claims for relief.

In her first claim, plaintiff alleges that Kulongoski denied plaintiff her constitutional right to a name-clearing hearing and published false allegations against her without conducting a fair and thorough investigation. Plaintiff also alleges that Kroger failed to advise Kulongoski of plaintiff's right to a name-clearing hearing or insure that plaintiff was provided a name-clearing hearing. Plaintiff's second claim is against the State of Oregon, Kulongoski, Kroger, Bennett, Black, Green, and Harra for conspiracy to deny her a name-clearing hearing in violation of § 1983. Plaintiff's third claim is against the State of Oregon for breach of contract, alleging that the State breached its employment contract with plaintiff when she was discharged as a direct result of her compliance with, and execution of, the Governor's executive orders and directives.

A. The State of Oregon is dismissed from plaintiff's first two claims for relief.

Plaintiff concedes that the State of Oregon is not a proper party to a § 1983 claim. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (states are not "persons" within the meaning of 42 U.S.C. § 1983, and therefore cannot be sued for violation of civil rights under color of state law). Accordingly, State defendants' motion to dismiss the State of Oregon from plaintiff's first and second claims is granted.

B. Kulongoski and Kroger are dismissed from both plaintiff's first and second claims for relief; Bennett, Black, and Green are dismissed from plaintiff's second claim for relief.

With respect to the remaining defendants in plaintiff's first two claims for relief, State defendants argue that Kulongoski, Kroger, Bennett, Black, and Green all lacked authority to "cause" the constitutional injury to plaintiff, because no statute or rule exists which authorizes them to offer plaintiff a name-clearing hearing. As to Harra, State defendants maintain that he was authorized to grant plaintiff a name-clearing hearing but that a sufficient causal connection between Harra's wrongful conduct and the constitutional violation is lacking. I agree in part.

Plaintiff's first two claims are based on failures to act. In order to be liable for the deprivation of a constitutional right, within the meaning of § 1983, State defendants must have "cause[d]" the constitutional injury to plaintiff. Failing to perform when one is legally required to do so may "cause" constitutional injury

within the meaning of § 1983. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (citing Sims v. Adams 537 F.2d 829 (5th Cir. 1976)). Furthermore, plaintiff argues that in order to be liable for inaction, "[w]itholding comments, advice or action when there is a duty to act has to suffice." Pl.'s Opp., p. 8. Therefore, plaintiff's first and second claims are based on the existence of a duty to act and defendants' subsequent failure to do so. However, if one lacks authority to "cause" the constitutional injury, failure to perform cannot violate § 1983 as a matter of law. See Gratsch v. Hamilton County, 12 Fed. Appx. 193, 206 (6th Cir. 2001) (holding that where defendant lacked authority to provide pre-termination hearing, defendant cannot be liable under § 1983 for failure to provide such a hearing). As such, both the first and second claims require evidence of each State defendants' authority to offer plaintiff a name-clearing hearing.

Plaintiff fails to provide "significant probative evidence" in support of her assertion that Kulongoski, Kroger, Bennett, Black, and Green each possessed authority to grant plaintiff a name-clearing hearing. Anderson, 477 U.S. at 249. Neither Bennett nor the Oregon Department of Justice has authority to offer a name-clearing hearing to employees of other agencies. Bennett Decl., p. 2. Plaintiff's conclusory assertion that Kroger and Bennett's involvement extended beyond advising and consulting does not establish their authority to grant a name-clearing hearing. Pl.'s

Decl., pp. 4, 9. While Or. Rev. Stat. 180.060(6) and (7) grant the Attorney General authority to, "when requested, perform all legal services for the state or any department or officer of the state," plaintiff offers no evidence that Kroger, as an attorney advising a client, can force the Governor or other State official to choose a particular course of action. Furthermore, based on this court's ruling on Plaintiff's Motion to Compel (doc. 62), there can be no evidence concerning what advice, if any, Kroger or Bennett provided. Id. Likewise, plaintiff's assertion that she only received instructions regarding her duties from two sources, one of which was Governor Kulongoski's office, is insufficient to establish Kulongoski's authority to grant a name-clearing hearing. As to Black and Green, plaintiff offers no evidence establishing the authority of Black and Green to offer plaintiff a name-clearing hearing.

Regarding Harra, State defendants concede that he had authority to grant plaintiff a name-clearing hearing, and that plaintiff was never offered a name-clearing hearing. However, State defendants argue Harra cannot be held liable because he did not publish the allegedly stigmatizing statements. I disagree and find a genuine issue of material fact as to Harra's personal involvement in the constitutional deprivation. Because it is not the publication of stigmatizing information, but "the denial of the name-clearing hearing that causes the deprivation of the liberty

interest without due process," Brown v. City of Niota, 214 F. 3d 718, 722-23 (6th Cir. 2000), Harra may be liable under a theory of supervisory liability if he was personally involved in the constitutional deprivation or if there was a sufficient causal connection between Harra's wrongful conduct and the constitutional violation. See Hansen v. Black, 885 F. 2d 642, 646 (9th Cir. 1989). Moreover, Harra is not required to have published the stigmatizing information about plaintiff - it is sufficient that another officer or employee of the State of Oregon is alleged to have done so. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (where government action injured reputation, opportunity to be heard is prescribed); see also In re Selcraig, 705 F. 2d 789, 796 (5th Cir. 1983) (explaining that "the fourteenth amendment provides [] procedural protection against injury inflicted by state officers to the interest state employees have in their reputation").

Therefore, because State defendants establish that no genuine issue of material fact exists as to Kulongoski, Kroger, Bennett, Black, and Green, but fail to so establish as to Harra, State defendants' Motion for Partial Summary Judgment is granted in part and denied in part.

C. State defendants' motion to dismiss plaintiff's third claim for relief is denied.

Plaintiff's third claim for relief alleges that the State of Oregon breached plaintiff's employment agreement when it discharged

plaintiff as a direct result of her compliance with, and execution of, the Governor's executive orders and directives. State defendants argue that plaintiff's third claim should be dismissed, based on her concession in response to Local 503's Motion to Dismiss that she was not a beneficiary of the collective bargaining agreement. I disagree.

Plaintiff asserts that her third claim is based on two separate contracts: a collective bargaining agreement between the State of Oregon and Local 503 and an employment contract between the State of Oregon and plaintiff. The collective bargaining agreement with Local 503 constitutes only one prong of this "two-pronged approach." Pl.'s Opp., p. 10. The other prong, which plaintiff has not withdrawn, alleges that plaintiff's employment contract with the State of Oregon also consisted of her agreement to manage OHLA consistently with the Governor's directives and instructions. Am. Compl. ¶ 65. This prong alleges that plaintiff complied with those instructions and directives and that her doing so initiated the staff complaints for which she was discharged. In other words, plaintiff argues that she was fired for following the Governor's directives, in breach of her employment agreement with the State of Oregon.

State defendants' motion to dismiss plaintiff's third claim for relief is therefore denied on this ground.

II. Plaintiff's Motion to Amend Complaint

Plaintiff requests leave to amend her complaint to allege that current State defendant Kroger violated 42 U.S.C. § 1983 when he failed to offer plaintiff a name-clearing hearing.

Under Federal Rule of Civil Procedure 15(a), leave to amend pleading "shall be given freely when justice so requires." The court may consider several factors when considering a motion to amend: (1) undue delay; (2) bad faith; (3) prejudice to the opponent; and (4) futility of amendment. Sweaney v. Ada County, 119 F. 3d 1385, 1392 (9th Cir. 1997). Here, I find amendment futile in light of my ruling on State defendants' motion to dismiss Kroger from plaintiff's first and second claims for relief, and plaintiff's proposed amendments do not alter my analysis. I also find that plaintiff failed to confer as required by Local Rule 7-1. Therefore, plaintiff's motion to amend her complaint is denied.

CONCLUSION

For the reasons discussed above, State defendants' Motion for Partial Summary Judgment (doc. 44) is GRANTED in part and DENIED in part. Plaintiff's Motion to Amend Complaint (doc. 55) is DENIED. Plaintiff's Motion to Strike (doc. 51) is DENIED.

IT IS SO ORDERED.

Dated this 22nd day of November, 2011.

Ann Aiken
United State District Judge